

EXHIBIT A

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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,
 JEREMY DAVIS, CHRISTOPHER
 CASTILLO, and MONIQUE TRUJILLO
 individually and on behalf of all similarly
 situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' (PROPOSED) MAY 16,
 2022 SUPPLEMENT TO THEIR
 SANCTIONS MOTION**

The Honorable Susan van Keulen

1 Since the April 21, 2022 hearing on Plaintiffs' Sanctions Motion (Dkt. 430), Google has
 2 twice sought to manufacture self-serving evidence on topics where Google withheld discovery.
 3 Consistent with the relief Plaintiffs seek in their Sanctions Motion (Dkt. 430), Plaintiffs now ask
 4 the Court to preclude Google from relying on (1) a supplemental interrogatory response that
 5 Google served on May 12, 2022, discussing the Incognito detection bits; and (2) Google's April
 6 25, 2022 Declaration of Richard Harting, an undisclosed witness, regarding the purported burden
 7 of Google preserving data. Dkt. 551. Moreover, these two examples show why the Court should
 8 preclude Google from making any arguments about any of the Incognito detection bits. Google is
 9 doing precisely what Plaintiffs feared, namely, relying on its own say-so about these bits after
 10 blocking Plaintiffs from obtaining meaningful discovery into them. Preclusion will cure that
 11 prejudice.

12 On December 22, 2021, Plaintiffs served Interrogatory No. 35, asking Google to *describe*
 13 *any* [REDACTED] Mao Decl. ¶ 3. Google responded on January 28,
 14 2022, stating: [REDACTED] Mao
 15 Decl. Ex. B. On May 12, 2022, months after the discovery cutoff, after the sanctions hearing, and
 16 after Plaintiffs served their expert reports, with no prior notice to Plaintiffs, Google served a
 17 supplemental response to that interrogatory, with Google including various factual assertions about
 18 its Incognito detection bits and their purported limitations. *See id.*

19 Google should be precluded from relying on this supplemental response. "If a party fails
 20 to provide information or identify a witness as required by Rule 26(a) or (e), the party is not
 21 allowed to use that information . . . unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Here, Google's failure is neither justified nor harmless. While still
 22 inexcusably late, a January revelation of the Incognito detection bits would have at least given
 23 Plaintiffs over a month to seek discovery. Instead, Plaintiffs obtained limited discovery concerning
 24 maybe_chrome_incognito and no discovery concerning is_chrome_incognito—receiving no
 25 documents. Dkt. 536 at 6. Google cannot now, after fact discovery has ended, backfill with self-
 26 serving assertions in a supplemental interrogatory response that Plaintiffs will never be able to
 27 question or explore. Google's strategy here only further shows why Google should be precluded
 28

1 from making *any* arguments about these Incognito-detection bits, for the reasons stated in
 2 Plaintiffs’ prior filings. Google’s obstruction was plainly “designed to achieve a tactical
 3 advantage” and such “obstruction should not be permitted to achieve its objectives.” *Conway v.*
 4 *Dunbar*, 121 F.R.D. 211, 214 (S.D.N.Y. 1988).

5 The same rules warrant precluding Google from relying on the Harting Declaration, filed
 6 on April 25, 2022. Dkt. 551. Although Mr. Harting claims to work on Ad Manager, which was
 7 included in Plaintiffs’ original class definition, Google never disclosed Mr. Harting. *See* Sanctions
 8 Hearing Exs. 32, 34-35 (identifying people disclosed by Google, not including Mr. Harting).
 9 Google should not be permitted to now submit and rely upon self-serving statements by an
 10 undisclosed witness, after the close of discovery, regarding the burden to Google of preserving
 11 data (with the Incognito-detection bits), particularly when Google successfully opposed Plaintiffs’
 12 request for 30(b)(6) testimony on preservation and burden. Dkt. 418-1 at 19 (Topic 9).

13 While Google should not be permitted to rely on that declaration (or any further declaration
 14 or testimony by Mr. Harting), Plaintiffs nonetheless ask that the Court consider the fact that the
 15 declaration very clearly undermines Mr. Golueke’s April 21 hearing testimony. Mr. Golueke
 16 sought to justify his failure to identify certain logs containing the Incognito-detection bits on the
 17 basis that he and Google were focused on Analytics and Ad Manager logs. Apr. 21 Tr. 189:1-8.
 18 Mr. Harting’s Declaration confirms that at least [REDACTED] undisclosed logs which contain
 19 maybe_chrome_incognito and/or were studied by Bert Leung are used *for Ad Manager*. *See*
 20 Plaintiffs’ May 3, 2022 Hearing Slide 24; Harting Decl. ¶ 1 (“These logs store historical event-
 21 level data about ads served through the Google Ad Manager product”); *id.* ¶ 5 (listing the
 22 logs). This admission further demonstrates the unreliability of Mr. Golueke’s testimony and
 23 highlights Google’s misconduct.

24
 25
 26 Dated: May 16, 2022

Respectfully submitted,

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 28 By: /s/ Mark Mao

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